Supreme Court, U.S.
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No. 06-627

IN THE
Supreme Court of the United States

DORIS DEUTH, WARDEN,
Petitioner

versus

CARRIE GENTRY,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER A FEDERAL HABEAS COURT MAY ORDER A STATE COURT JUDGMENT OF CONVICTION NULL AND VOID?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the Court whose judgment is under review are: (1) the Commonwealth of Kentucky; and (2) Carrie Gentry.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the Commonwealth of Kentucky, as counsel for Petitioner Doris Deuth, Warden, petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The petitioner seeks certiorari review of the published Sixth Circuit panel decision in Gentry v. Deuth, 456 F.3d 687 (6th Cir. 2006).

The procedural history leading to the United States Sixth Circuit Court of Appeals Opinion is as follows. Gentry's convictions for manslaughter second degree and driving under the influence first offense were affirmed by the Kentucky Court of Appeals in an unpublished opinion (2000-CA-1893) entered on December 7, 2001. (discretionary review denied by the Kentucky Supreme Court). On January 23, 2003, Gentry filed a petition for writ of habeas corpus. The Federal District Court for the Western District of Kentucky, on May 21, 2004, entered a judgment implementing its Memorandum Opinion conditionally granting the writ of habeas corpus to Ms. Gentry. On July 22, 2005, the District Court entered its Final Judgment, which altered and/or amended its May 21, 2004, judgment granting Gentry an absolute writ and ordering her state court judgment of conviction null and void. On appeal United States Court of Appeals for the Sixth Circuit was only asked to address the District Court's July 22, 2005 judgment, which

it then affirmed in Gentry v. Deuth, 456 F.3d 687 (6th Cir. 2006).

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254. The petitioner seeks certiorari review of a United States Court of Appeals Opinion decided July 31, 2006, granting Gentry an absolute writ of habeas corpus and nullifying Gentry's state court judgment of conviction.

Rehearing was not sought in this case and this petition is timely pursuant to United States Supreme Court Rule 13.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. III § 2 - "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . ."

28 U.S.C. § 2243 - ". . .The Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

STATEMENT OF THE CASE

The facts of this case are not in dispute and are not particularly relevant to the subject of this appeal. Therefore, petitioner will only briefly describe the facts underlying Gentry's convictions. On January 28, 1999, Carrie Gentry met the victim, Brian Pettit, at a bar in McCracken County, Kentucky. Although both had been drinking, Gentry claimed to be much more sober than Mr. Pettit and agreed to drive them back to her apartment in Pettit's vehicle. Once at the apartment Pettit wanted to continue listening to some music he had recently purchased, so Gentry agreed to continuing driving Pettit around so they would not wake Gentry's daughter who was sleeping back at the apartment. While driving, Gentry's failed to negotiate a curve and hit a bridge abutment. Both Gentry and Pettit were ejected from the vehicle and Pettit died at the scene. (See 6th Cir. Opinion, Apx. 2).

Ultimately Gentry was tried and convicted in state court of manslaughter in the second degree and driving under the influence first offense. (Apx. 3). The Kentucky Court of Appeals affirmed Gentry's convictions and the both the Kentucky Supreme Court and the United States Supreme

Court declined to review Gentry's convictions. Gentry v. Kentucky, 537 U.S. 981 (2002) (denying *cert.*).

On January 23, 2003, Gentry filed a petition for writ of habeas corpus relief in district court. In July 2003, Gentry was unconditionally released from state court custody, having served out the sentence imposed by state court. Initially, the district court denied Gentry's petition finding that the use of the two-way video to present trial testimony which violated Gentry's right to confrontation under the Sixth Amendment was harmless. Gentry then moved to alter or amend the district court's ruling arguing that the court misapplied the harmless error standard. (Apx. 3).

On May 21, 2004, the district court entered a second Memorandum Opinion finding that its prior harmless error analysis was inadequate thus, granting Gentry's motion to alter and amend. (Apx. 3). The district court conditionally granted the writ of habeas corpus, "if the Commonwealth does not retry Gentry within ninety days of the entry of this judgment should appeal not be taken, or within ninety days of any final opinion on appeal that affirms this revisited decision should an appeal be taken by the respondent." (Apx. 24). The Commonwealth of Kentucky noticed an appeal, but then voluntarily abandoned the appeal on July 12, 2004. (Apx. 3).

Approximately eight months after the district court's order granting Gentry's petition for a writ, Gentry filed with the district court a Motion to Enforce Judgment by voiding the Commonwealth's judgment of conviction so that she could not be made to suffer any collateral consequences as a result of being a convicted felon. (Apx. 4). On July 21, 2005, the district court granted Gentry's motion to enforce by converting the conditional writ to an absolute writ and ordering Gentry's state court judgment of conviction null and void. (Apx. 20-21).

The Commonwealth appealed on August 18, 2005, so that the Sixth Circuit could address whether or not a district court retained jurisdiction to alter its prior judgment and whether the district court in a habeas action has the power to simply void a state court judgment.

In Gentry v. Deuth, 456 F.3d. 687 (6 Cir. 2006), the Sixth Circuit affirmed the district court's July 21, 2005, judgment holding that:

> (1) petitioner's motion to enforce order was not motion to alter or amend judgment;
>
> (2) District Court retained jurisdiction over conditional grant of habeas corpus;

(3) petition was live case or controversy not rendered moot by petitioner's release from prison;

(4) petitioner exhausted potential challenges to collateral consequences of conviction; and

(5) District Court had authority to nullify conviction.

(Apx. 1-19). The Commonwealth did not request rehearing, opting instead to pursue this petition for *certiorari*.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED IN ORDER TO HARMONIZE TWO CONFLICTING LINES OF AUTHORITY STEMMING FROM FAY v. NOIA, 372 U.S. 391 (1963), AND CARAFAS v. LaVALLEE, 391 U.S. 234 (1968) AND TO FINALLY DEFINE THE SCOPE OF RELIEF AUTHORIZED BY 28 U.S.C. § 2243.

Valid Supreme Court precedent continually relied on by the federal circuits prevents a federal habeas court from revising, voiding, or vacating a state court judgment. See Fay v. Noia, 372 U.S. 391 (1963). However, the Sixth Circuit in Gentry v. Deuth, 45 F.3d 687, 693 (6th Cir. 2006), relied on and interpreted another line of valid Supreme Court authority as permitting a federal habeas court to grant any relief,

including declaring a state court conviction null and void, as justice requires. See Carafas v. LaVallee, 391 U.S. 234 (1968); Sibron v. New York, 392 U.S. 40 (1968). In Gentry the Sixth Circuit attempted to justify its reliance on the line of authority stemming from Carafas because it was decided subsequent to Fay and because it seemed to fit with the language of 28 U.S.C. § 2243, which authorizes a habeas court to, "dispose of the matter as law and justice require." However, this explanation is insufficient given that Fay continues to be good law that is routinely relied on and cited as limiting the scope of relief available to a successful petitioner by the numerous federal courts. Thus, it is incumbent on this Court to finally resolve this long standing conflict and determine once and for all the extent of a federal habeas court's power to grant relief directly affecting a state court's judgment.

In Fay v. Noia, 372 U.S. 391, 430-431, 83 S.Ct. 872, 9 L.Ed.2d 837 (1963), this Court found that,

> Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.

See, Wilson v. Lawrence County, 154 F.3d 757, 761 (8th Cir. 1998) ("[a] writ of habeas corpus does not reverse or void the state judgment of conviction"); Henderson v. Frank, 155 F.3d 159, 168 (3rd Cir. 1998) (federal court in habeas proceeding has no authority to revise the state court judgment; court may determine only whether there is an improper detention and, if so, order the release of the prisoner conditioned on the State's opportunity to correct errors); Duhamel v. Collins, 955 F.2d 926, 968 (5th Cir. 1992) (A federal habeas court is empowered to dispose of the matter as law and justice require, but a federal district court does not have the authority to commute a death sentence to life imprisonment); Madigan v. Snyder, 804 N.E.2d 546, 554 (Il. 2004) ("A federal court considering a state prisoner's petition for writ of habeas corpus does not have the authority to revise a state court judgment"); Wanatee v. Ault, 120 F.Supp. 784 (N.D. Iowa, 2000), (". . .court had no other power than to order Wanatee's release."). In its unpublished disposition of Moore v. Rose, 19 F.3d 1433 (Table), 1994 WL 102958 (6th. Cir 1994), the Sixth Circuit Court expressly indicated its agreement with the holding of Fay, surpa, when determining the appropriateness of a remedy. In Barry v. Brower, 864 F.2d 294, 300 (3rd Cir. 1988), the Third Circuit found that,

> Although the district court did not err in granting Barry a writ of habeas corpus, it went beyond its power in directly ordering the Appellate Division of the New Jersey Superior Court to reinstate his appeal. Both the historic nature of the writ and principles of federalism preclude a federal court's direct interference with a state court's conduct of state litigation.

Based on the express language in Fay, supra, and other supporting authorities, it appears clear that a federal habeas court cannot grant relief directly affecting the state court's judgment. Nonetheless, the Sixth Circuit has not only granted Gentry relief inconsistent with Fay, its progeny and the historical nature of the writ itself, but has also granted Gentry relief not originally requested in her petition for writ of habeas corpus.

Despite the apparent clarity of Fay and the other authorities cited above, law governing a federal court's power to fashion remedies when granting a habeas petition is not. In Carafas v. LaVallee, 391 U.S. 234 (1968), this Court expanded the historical scope of the great writ to permit a federal court to fashion relief as by justice requires. See also 28 U.S.C. § 2243. Specifically, this Court in Carafas found that a petitioner's challenge was not mooted by his release from incarceration prior to his hearing because of the collateral consequences that stemmed from his convictions

and authorized a federal court to fashion relief necessary to alleviate the collateral consequences. Id. at 237; See Sibron v. New York, 392 U.S. 40 (1968). In this case, the Sixth Circuit conceded that no Supreme Court authority exists that would directly authorize a federal district court to void a state court judgment by acknowledging that, "the courts have heretofore had little occasion to speak directly to the district court's authority to nullify an unlawful state conviction. . ." Nonetheless, the Sixth Circuit in Gentry reasoned that justice requires such relief be available to release a successful petitioner from the collateral consequences stemming from the unlawful conviction. Gentry, 45 F.3d at 696-697.

In reaching the above conclusion the Sixth Circuit chose to marginalize this Court's holding in Fay (the only Supreme Court precedent directly addressing the issue) and chose to ignore authority from other federal courts that relied on and followed Fay, in favor of expansively interpreting Carafas and Sibron in order to tenuously craft an explanation to justify its desired result. The Sixth Circuit's holdings in Gentry stretch the original purpose of the writ to its absolute extreme. Although it is evident that this Court has sought to expand the scope of relief available to a federal habeas court to include more than just release, it is also evident that this Court has not gone so far as to authorize a federal habeas

court to simply void a state court's judgment of conviction. To authorize such relief, as the Sixth Circuit does in Gentry, would violate the fundamental tenets of our system of federalism and unnecessarily offend the importance of comity between the state and federal courts.

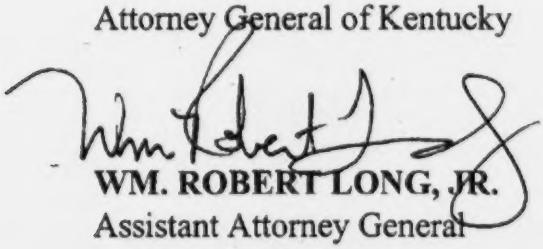
The Sixth Circuit's decision in Gentry further offended comity between the federal and state courts by finding it unnecessary for Gentry to have requested relief from collateral consequence in her original petition and that it was not necessary for Gentry to exhaust her state court remedies before seeking such relief. Through its decision in this case the Sixth Circuit has condoned the ultimate encroachment on the state's sovereignty by allowing a federal court to unilaterally declare a state court judgment of conviction null and void without first affording the state any opportunity to address petitioner's concerns regarding the imposition of collateral consequences.

CONCLUSION

WHEREFORE, certiorari review should be granted.

Respectfully submitted,

GREGORY D. STUMBO
Attorney General of Kentucky



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APPENDIX TO CERTIORARI PETITION

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APPENDIX

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[1] In addition to the judgment and opinion contained in this this Appendix, the district court in this case issued two other opinions on March 17, 2004, and May 21, 2004. These opinions have not been included in this Appendix since the deal solely with the merits of Gentry's habeas petition; i.e., whether or not the use of two-way video to present trial testimony violated Gentry's right of confrontation under the Sixth Amendment.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 06a0265p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CARRIE GENTRY,)
Petitioner-Appellee,)
)
v.)
)
DORIS DEUTH, Warden, Kentucky)
Correctional Institute for Women,)
Respondent-Appellant.)

Appeal from the United States District Court
for the Western District of Kentucky at Paducah.
No. 03-00015—Edward H. Johnstone, District Judge.

Argued: May 31, 2006

Decided and Filed : July 31, 2006

Before: BOGGS, Chief Judge; and GIBBONS and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: William Robert Long, Jr., OFFICE OF THE ATTORNEY GENERAL, Frankfort, Kentucky, for Appellant. Timothy G. Arnold, DEPARTMENT OF PUBLIC ADVOCACY, Frankfort, Kentucky, for Appellee. **ON BRIEF:** William Robert Long, Jr., OFFICE OF THE ATTORNEY GENERAL, Frankfort, Kentucky, for Appellant. Timothy G. Arnold, DEPARTMENT OF PUBLIC ADVOCACY, Frankfort, Kentucky, for Appellee.

OPINION

BOGGS, Chief Judge. This is a case in which the district court granted a conditional writ of habeas corpus after the petitioner had already been released from incarceration, but no party challenges that order. Instead, the respondent-appellant Commonwealth of Kentucky challenges the district court's subsequent order rendering the conditional writ absolute in response to the appellee's motion to enforce, on the grounds that the commonwealth had failed to comply with the district court's conditions. By the express terms of this order, the district court nullified the petitioner-appellee's criminal conviction so that she would not suffer any collateral consequences as a result of her felony conviction. For the reasons stated below, we affirm.

I

The facts of this case are not in dispute. On January 28, 1999, Carrie Gentry met Brian Pettit at Ginger and Pickles, a bar in McCracken County, Kentucky. Both were drinking, though Gentry claims that she was much more sober than her new friend. Gentry agreed to drive Pettit, in his 1991 Ford Mustang, to her apartment. Upon arriving at her home, however, Pettit wished to continue listening to some new music that he had recently purchased, so Gentry agreed to keep driving so as not to wake her daughter who was asleep in the apartment. While driving, Gentry failed to negotiate a curve. The car crossed the center line, hit a bridge abutment, and flipped in the air. Both Pettit and Gentry were ejected from the vehicle. Pettit died at the scene.

Gentry was indicted by a grand jury for driving under the influence and manslaughter in the second degree. During trial, the Commonwealth introduced, over Gentry's objections, the testimony of five expert witnesses-state employees testifying as to Gentry's blood alcohol level and as to physical evidence in the car that pointed to her as having been the driver-via two-way closed-circuit television. Gentry was convicted and sentenced to five years in prison. Gentry's appeals were denied at all levels, including the United States Supreme Court. *Gentry v. Kentucky*, 537 U.S. 981, 123 S.Ct. 450, 154 L.Ed.2d 343 (2002) (denying *cert.*).

Gentry filed the instant habeas petition on January 23, 2003. While her petition remained pending, she was released from prison in July 2003. The district court denied her habeas

petition on March 18, 2004, holding that although the Commonwealth had violated Gentry's Sixth Amendment Confrontation Clause rights by employing the two-way closed-circuit system without good cause, the error had been harmless. Gentry then filed a motion to alter or amend judgment, and the district court subsequently changed its mind, holding that its prior harmless error analysis had been inadequate. The court conditionally granted a writ of habeas corpus "if the Commonwealth does not retry Gentry within ninety days of the entry of this judgment should appeal not be taken, or within ninety days of any final opinion on appeal that affirms this revisited decision should an appeal be taken by the respondent." The order was entered on the docket on May 21, 2004. Kentucky filed an appeal, but then dropped it voluntarily on July 14, 2004.

On January 27, 2005, Gentry filed a motion asking the district court to enforce its May 2004 judgment by voiding the Commonwealth's conviction so that she would not face any collateral consequences as a result of having been convicted of a felony. The district court granted this motion on July 21, 2005, converting the conditional grant of habeas into an absolute grant, and nullifying the conviction. The Commonwealth thereafter filed a timely appeal from that order.

II

We review a district court's disposition of a habeas petition *de novo*, and its findings of fact for clear error. *Rickman v. Bell*, 131 F.3d 1150, 1153 (6th Cir.1997). Questions of law or

or mixed questions of law and fact are reviewed *de novo*. *Ruimveld v. Birkett*, 404 F.3d 1006, 1010 (6th Cir.2005). As this appeal is essentially predicated on a technical legal issue-whether the district court possessed jurisdiction over the motion to enforce and the authority to nullify the Commonwealth's conviction-we must apply *de novo* review.

A

The Commonwealth first argues that Gentry's January 2005 motion to enforce should be construed as a motion to alter or amend judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure and that such a motion would have been untimely as it was filed eight months after entry of judgment. The state predicates this argument on its assertion that Gentry was asking for relief that she had not been previously granted-relief from collateral consequences of her felony conviction-and that such relief was extrinsic to the conditional writ. As such relief was ostensibly not granted by the district court's May 2004 order, the state thus suggests that Gentry was essentially asking the court to alter or amend its judgment pursuant to Civil Rule 59.

The Commonwealth is wrong. In her January 2005 motion, Gentry clearly asked the district court to *enforce* its May 2004 judgment, and she did not challenge or seek to amend that order. The district court issued its May 2004 order "conditionally granting [the writ] if the Commonwealth does not retry Gentry within ninety days of the entry of this judgment should not appeal be taken, or within ninety days of any final opinion on appeal that affirms this revisited

decision should an appeal be taken by the respondent." The Commonwealth unquestionably failed to grant Gentry a new trial, and therefore it failed to abide by the condition that the district court had established. As there was no need to release Gentry from incarceration, the only action required was to expunge Gentry's record of her unconstitutional felony conviction. The Commonwealth took no such action. Gentry therefore filed her January 2005 motion asking for the essential relief contemplated by the conditional order, for the court's May 2004 order implicitly expected that the Commonwealth would vacate the prior judgment pursuant to seeking a new trial, and thus the Commonwealth's failure to seek a new trial effectively circumvented the district court's purpose. The motion was thus not filed pursuant to Civil Rule 59, and it was not untimely.

B

The Commonwealth next argues that the district court did not retain jurisdiction to hear this matter. Again, the Commonwealth is incorrect. In the first place, the sole distinction between a conditional and an absolute grant of the writ of habeas corpus is that the former lies latent unless and until the state fails to perform the established condition, at which time the writ springs to life. *See Smith v. Lucas*, 9 F.3d 359, 366-67 (5th Cir.1993); *McQuillion v. Duncan*, 253 F.Supp.2d 1131, 1134 (C.D.Cal.2003). District courts rightly favor conditional grants, which provide states with an opportunity to cure their constitutional errors, out of a proper concern for comity among the co-equal sovereigns. "[C]ourts may delay the release of a successful habeas petitioner in

order to provide the State an opportunity to correct the constitutional violation found by the court." *Hilton v. Braunskill*, 481 U.S. 770, 775, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). Absolute grants are therefore generally limited to situations where the nature of the error is simply incurable, such as a conviction under an unconstitutional statute. *See, e.g., Staley v. Jones*, 108 F.Supp.2d 777, 788 (W.D.Mich.2000), *rev'd on other grounds*, 239 F.3d 769 (6th Cir.2001). Conditional grants of writs of habeas corpus are final orders, *Phifer v. Warden, United States Pen., Terre Haute, Ind.*, 53 F.3d 859, 862 (7th Cir.1995), exactly like absolute grants, and they ordinarily and ideally operate automatically, that is, without the need for the district court to act further.

Nevertheless, district courts retain jurisdiction to execute a lawful judgment when it becomes necessary. "If the state complies with its order, the petitioner will not be released; if the state fails to comply with its order, release will occur. Ordinarily, the only task that remains for the district court is the execution of judgment." *Ibid.* "A federal district court retains jurisdiction to determine whether a party has complied with the terms of a conditional order in a habeas case. A state's failure to timely cure the error identified by a federal district court in its conditional habeas order justifies the release of the petitioner." *Satterlee v. Wolfenbarger*, No. 03-71682-DT, 2005 U.S. Dist. LEXIS 25874, at *6 (E.D.Mich. Oct. 19, 2005) (internal citations omitted) (vacating petitioner's conviction), *aff'd in part*, 453 F.3d 362 (6th Cir.2006). *See also Santos-Rosario v. Renico*, 05-CV-70456, 2006 U.S. Dist. LEXIS 14074, at *3-4 (E.D.Mich. March 30,

2006) (denying writ even though the state failed to comply with the precise terms of the district court's conditions because the state had substantially complied with the conditions). On the other hand, when a state meets the terms of the habeas court's condition, thereby avoiding the writ's actual issuance, the habeas court does not retain any further jurisdiction over the matter. *Pitchess v. Davis*, 421 U.S. 482, 490, 95 S.Ct. 1748, 44 L.Ed.2d 317 (1975) (per curiam) (noting "[n]either Rule 60(b), 28 U.S.C. § 2254, nor the two read together, permit a federal habeas court to maintain a continuing supervision over a retrial conducted pursuant to a conditional writ granted by the habeas court.").

As Gentry had been released from prison prior to the district court's order, the Commonwealth obviously had no duty under the district court's order to take any action with respect to her person. However, Gentry's status as a convicted felon apparently remained in force, as the Commonwealth did not nullify her conviction, and thus her January 2005 motion reasonably asked the court to enforce its order by making the conditional writ absolute. Therefore, we find that the district court retained jurisdiction to enforce its conditional grant of a writ of habeas corpus.

C

Next, the Commonwealth argues that Gentry's January 2005 motion was moot because the essential object of the conditional habeas writ-release of the person of the petitioner-had already been met, claiming the condition for granting the writ occurred and Gentry, who had already completed service of her sentence, was entitled to

be released from custody. The district court's judgment did not void or otherwise vacate the state court's judgment of conviction nor did it place any other duty or condition on the Commonwealth.

Appellant's Br. at 15-16. Thus, the Commonwealth argues, "once the condition occurred and Gentry was released from custody there ceased to be a case in [sic] controversy." Ibid. This simply misstates the law respecting habeas relief, for it muddies the clear distinction between a habeas petition challenging a conviction, and one challenging the particularities of sentencing.

Article III, Section 2 of the United States Constitution authorizes the federal judiciary only to hear cases or controversies, and therefore federal courts may not exercise jurisdiction when the controversy has been mooted, that is to say, when the "issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Los Angeles County v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969)). *See also Stewart v. Blackwell*, 444 F.3d 843, 855-56 (6th Cir.2006). Although the Supreme Court had seemed to limit habeas relief to "the body of the petitioner" in *Fay v. Noia*, 372 U.S. 391, 430-31, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), a stance that was in line with the writ's historical function of releasing prisoners from incarceration, the Court subsequently expanded the writ's scope in *Carafas v. LaVallee*, 391 U.S. 234, 237, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), stating that the petitioner's challenge was not mooted

by his release from incarceration prior to his hearing because, "in consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror." *Ibid.* Therefore, "[o]n account of these 'collateral consequences,' the case is not moot." Id. at 237-38, 88 S.Ct. 1556. The Court reached a similar decision a few weeks later in *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), in which the petitioner had been released prior to argument in the state intermediate appellate court. Therefore the Supreme Court has found that the appropriate remedy for a writ of habeas corpus issued pursuant to an unlawful criminal conviction includes relief not only from the conviction's *direct* consequences (e.g. incarceration), but also from its collateral consequences. Id. at 55-58, 88 S.Ct. 1889.

We have followed this precedent, as we must. In *Abela v. Martin*, 380 F.3d 915, 921 (6th Cir.2004), we held, in part, that a petitioner's "release from custody and the subsequent conclusion of his parole term, after the filing of his habeas petition [challenging his conviction], do not render moot his appeal from the district court's denial of the petition" because "of the continuing collateral consequences to a wrongful criminal conviction." *Ibid.* (citing *Spencer v. Kemna*, 523 U.S. 1, 8, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998)). Similarly, in *Brewer v. Dahlberg*, 942 F.2d 328, 335 (6th Cir.1991), we held that a petitioner's challenge to his parole status, rather than a challenge to a parole revocation and consequent incarceration for parole violation, meant that his case was not

rendered moot simply because he was no longer imprisoned for his parole revocation. In *Green v. Arn*, 839 F.2d 300, 301-02 (6th Cir.1988), we concluded that a habeas petition was not mooted by the petitioner's release from prison prior to the court's determination, for the petitioner could still face "significant collateral consequences flow[ing] from a criminal conviction." *See also Stotts v. Perini*, 28 Ohio Misc. 111, 427 F.2d 1296, 1297 (6th Cir.1970) ("Petitioner's action is not mooted by his release from custody, because 'disabilities' may still result from the conviction which he is attacking.").

The Commonwealth mistakenly relies on a line of decisions that addresses habeas petitions attacking the *sentence* rather than the *conviction*. Post-release habeas petitions challenging the conditions of confinement are almost necessarily moot, for courts normally cannot offer any habeas redress in such circumstances. As the *Spencer* Court noted:

> Once the convict's sentence has expired, however, some concrete and continuing injury other than the now-ended incarceration or parole-some "collateral consequence" of the conviction-must exist if the suit is to be maintained. In recent decades, we have been willing to presume that a wrongful criminal conviction has continuing collateral consequences (or, what is effectively the same, to count collateral consequences that are remote and unlikely to occur).

Spencer v. Kemna, 523 U.S. at 7-8, 118 S.Ct. 978 (citations omitted). The Court in *Lane v. Williams*, 455 U.S. 624, 102

S.Ct. 1322, 71 L.Ed.2d 508 (1982), found moot the habeas petitions of defendants who had pled guilty to a felony pursuant to a plea agreement. The petitioners in that case challenged their incarceration for parole violation after they had served their sentences, and they alleged that they had been unaware that their plea bargains had included a term of parole. The district court granted them specific performance of their plea agreement by declaring void the mandatory parole terms. The Supreme Court then held that their petition was moot because they had been released during the petition's pendency, and because their petition attacked only their sentences. *Id.* at 630-31, 102 S.Ct. 1322. *See also Parker v. Ellis*, 362 U.S. 574, 80 S.Ct. 909, 4 L.Ed.2d 963 (1960). In *Diaz v. Kinkela*, 253 F.3d 241, 243-44 (6th Cir.2001), the petitioner, while serving a prison sentence for a matter unrelated to his later petition, was convicted by the parole board for felonious assault and possessing a dangerous weapon while in detention, and his term of incarceration was increased by 90 days under Ohio's "bad acts" statute. The petitioner challenged that "bad acts" conviction and his additional 90-day sentence, but, before the district court could hear his case, he was released from prison, and Ohio's Supreme Court found the "bad acts" statute to be unconstitutional. *Id.* at 243. The district court thereafter denied his petition, and we affirmed, because the challenged conviction had already been nullified, and the court found moot his sole surviving challenge to the additional 90 days of imprisonment because he had long since been released from prison. *Id.* at 243-44.

With respect to injury, an essential element of a live controversy, the law does not require a habeas petitioner to prove by a preponderance of the evidence that she may face collateral consequences of her unconstitutional felony conviction, for the disabilities consequent to a felony conviction are legion, and patently obvious in many cases. Indeed, as we have already noted, the Supreme Court has acknowledged that it has allowed federal courts to presume the existence of collateral consequences "in recent decades." *Spencer*, 523 U.S. at 8, 118 S.Ct. 978. Moreover, in the case before us, the petitioner has pointed to Kentucky statutes that, on their face and as a matter of law, strip her, as a felon, of certain rights and privileges, including, *inter alia*, the right to vote and certain driving privileges. *See* Ky. Const. § 145 (stripping felons of the right to vote); Ky. Const. § 150 (restricting felons from holding public office); Ky.Rev.Stat. Ann. § 29A.080(2)(e) (2006) (disallowing felons from serving on juries); Ky.Rev.Stat. Ann. § 527.040 (2006) (disallowing felons from possessing firearms); Ky.Rev.Stat. Ann. § 189A.070 (2006) (revoking driver's license pending alcohol treatment program); Ky.Rev.Stat. Ann. § 532.080 (2006) (making felons eligible for persistent felony offender charges). There are also well-known collateral consequences of a felony conviction under federal law of which we take judicial notice. *See, e.g.*, 18 U.S.C. § 922(g) (disallowing felons from possessing firearms). Therefore, to the extent that she was required to make a minimal showing of possible collateral consequences of her unconstitutional criminal conviction, Gentry has done so.

The instant petitioner raised a live and viable challenge to her felony conviction. *Abela*, *Spencer*, and the entire line of decisions dating back to *Carafas*, thus control this case. As such, the law obligates us to hold that Gentry's challenge to her conviction and its attendant direct and collateral consequences is not mooted simply by the fact of her prior release.

D

Focusing on the fact that the petitioner in *Diaz* had proposed as a remedy that we reduce his post-release control by 90 days, which we dismissed because he had not exhausted it in the state courts, the Commonwealth claims that *Diaz* mandates that we require the instant petitioner to exhaust her potential challenges to the collateral consequences of her conviction before we can address them. Yet the Commonwealth has misunderstood our analysis in *Diaz*. In the first place, as noted above, the petitioner in *Diaz* ultimately presented no viable challenge because his "bad acts" *conviction* had already been nullified as unconstitutional by the state supreme court before the district court could review his petition, and because he had long since been released from all confinement, including that arising from his "bad acts" *sentence*. As the district court was left with no possible remedy, his petition was moot. We then dismissed the *Diaz* petitioner's proposed remedy of reducing his post-release control by 90 days because that remedy was extrinsic to his petition, for the petitioner's period of post-release control had been determined by his unchallenged felony conviction, not by his "bad acts" conviction or

sentence. *Diaz v. Kinkela*, 253 F.3d 241. Therefore, the proposed remedy raised a legal question independent of the habeas petition, and so the petitioner in *Diaz* had failed to exhaust his challenge with respect to that issue as required, requiring us to dismiss his suit.

Turning to our case, we have already noted that a successful habeas challenge to an unconstitutional conviction necessitates relief not only from any present incarceration arising from that conviction, but also from any collateral consequences thereof. Therefore, Gentry's challenge to the collateral consequences of her conviction was implied by her original petition challenging her conviction as unconstitutional, and as she had successfully exhausted her claim before bringing her habeas petition in the first place, she also met all exhaustion requirements with respect to the collateral consequences of that challenged conviction.

Successful habeas petitioners are entitled to the appropriate benefit of the writ, and we cannot require them to exhaust their claims anew in order to receive that benefit. To mandate that a petitioner who has obtained a writ of habeas corpus with respect to her unconstitutional conviction independently challenge the attempted imposition of collateral consequences of her unconstitutional conviction in state judiciaries, either *in toto* or *seriatim*, would, at a minimum, entail a uselessly formal acknowledgment of the states' sovereignty, for states could not constitutionally enforce those collateral consequences. Indeed, the Commonwealth itself implicitly acknowledges this problem in that it failed to raise any merits defense of its potential imposition of

criminal collateral consequences against Gentry. Even more perniciously, under the Commonwealth's proposal, a less ethical state might find itself able in practice to impose collateral consequences of unlawful convictions when successful habeas petitioners find the task of challenging the attempted imposition of those consequences too onerous or intimidating. But a government under the law simply could not long remain under the law by acting in such a manner. Therefore, we hold that the petitioner is not required to exhaust anew her challenge to the collateral consequences of her unconstitutional conviction.

E

Finally, the Commonwealth asserts that the district court did not possess lawful authority to nullify the petitioner's conviction. Relatedly, the state argues that federal courts cannot nullify state court decisions when "less drastic means of preventing enforcement of collateral consequences exists."

The Commonwealth is wrong in its assertion that federal courts, pursuant to the issuance of a writ of habeas corpus, lack the proper authority to nullify an unconstitutionally obtained state criminal conviction. To hold otherwise would be incongruent with the writ's historical purpose and with the will of Congress, which has seen fit to empower the federal courts to dispose of habeas matters "as law and justice require." 28 U.S.C. § 2243. Accordingly, we have held that federal courts have been given "broad discretion in fashioning [habeas corpus] relief." *Gall v. Parker*, 231 F.3d 265, 335 (6th Cir.2000). While the courts have heretofore had

little occasion to speak directly to the district court's authority to nullify an unlawful state conviction, *see, e.g., Heck v. Humphrey*, 512 U.S. 477, 486-87, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) ("in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [42 U.S.C.] § 1983 plaintiff must prove that the conviction or sentence has been .... [*inter alia*] called into question by a federal court's issuance of a writ of habeas corpus"), nevertheless the law is absolutely clear that the writ releases the successful petitioner from the state's custody, and, as we have discussed above, such release includes relief from the conviction's collateral consequences when it was the conviction itself that was found to be unconstitutional. As a practical, logical, and necessary matter, relief from the collateral consequences of an unconstitutionally obtained state criminal conviction effectively requires expungement of the conviction from the petitioner's record, and expungement of the record implies nullification of the unconstitutional conviction. *See Satterlee v. Wolfenbarger*, 453 F.3d at 370 ("It appears that we have never expressly addressed whether habeas courts have the power to order the expungement of the record of a conviction. We conclude that they do."); *Ward v. Wolfenbarger*, 340 F.Supp.2d 773, 776 (E.D.Mich.2004) ("A federal district court has the authority, in a habeas corpus proceeding, to order the expungement of a habeas petitioner's criminal records against all persons who maintain custody of such records." (citations and internal quotation marks omitted)). Put another way, a state acts *ultra vires* when it obtains a criminal conviction in violation of the United States

Constitution, and *ultra vires* acts bear no legitimate force in a government under the law. A public act without legitimate force is indistinct under the law from an act that never was, or an act that has been voided. Therefore, we hold that the district court acted within its constitutional authority when it nullified the petitioner's unlawful criminal conviction.

In so holding, however, we note that the fact that the writ *nullifies* the criminal conviction does not necessarily *reverse* that conviction, for the writ does not itself generally preclude the Commonwealth from retrying the petitioner if it can otherwise do so lawfully. Nullification is thus akin to a non-prejudicial dismissal. *See Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273, 277 (4th Cir.1977) ("While the state court judgment is neither reversed nor vacated, the prisoner is released and the state court judgment authoritatively declared void. Thereafter, the state court judgment should have no preclusive effect."); *Smith v. Spina*, 477 F.2d 1140, 1147-48 (3d Cir.1973) ("Although this court has ordered that a writ of habeas corpus issue, such action is not the equivalent of a reversal of a state conviction. Only the Supreme Court has power, on direct appeal, to reverse a state judgment of conviction."); *Rosa v. McCray*, 03 CIV 4643(GEL), 2004 U.S. Dist. LEXIS 24772, at *16 (S.D.N.Y. Dec. 8, 2004) ("Short of an order barring retrial, however, which is only appropriate in 'extraordinary' circumstances, even an order requiring release of a petitioner does not prohibit the reprosecution of the petitioner. Absent such extraordinary circumstances, the federal courts usually permit rearrest and retrial after the time period specified in the conditional release order has elapsed and the prisoner has been

released.") (citations and internal quotation marks omitted) (granting writ), *rev'd on other grounds*, 396 F.3d 210 (2d Cir.2005).

Moreover, the Commonwealth is wrong in its suggestion that the district court should have pursued an option "less drastic" than nullifying the conviction in order to provide the petitioner with an appropriate and effective remedy. Having correctly issued the writ, the choice of habeas remedy lies within the district court's sound discretion, *see Hilton*, 481 U.S. at 775, 107 S.Ct. 2113 (noting that "a court has broad discretion in conditioning a judgment granting habeas relief"), though, of course, "a federal district court ··· should give careful consideration to the appropriate demands of comity in effectuating its habeas corpus decree." *Parisi v. Davidson*, 405 U.S. 34, 46, 92 S.Ct. 815, 31 L.Ed.2d 17 (1972). As it took action only after the Commonwealth had decided, by its inaction, not to provide the petitioner with appropriate relief, and as its ultimate choice of remedy lay squarely within its constitutional authority, the district court did not abuse its discretion by nullifying the Commonwealth's unconstitutional conviction.

III

For the reasons stated above, we **AFFIRM**.

UNITED STATES DISTRICT COURT
WESTER DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:03CV 15-J

CARRIE GENTRY PETITIONER

v.

DORIS DEUTH, Warden
Kentucky Correctional Institute for Women RESPONDENT

FINAL JUDGEMENT

On May 21, 2004, this Court rendered a Conditional Writ of Habeas Corpus, conditional upon the Commonwealth's re-trial of Petitioner's case within ninety days. The Respondent failed to fulfill the condition precedent to re-try the Petitioner, and abandoned its appeal of the Judgment granting the Conditional Writ:

NOW THEREFORE, IT IS ORDERED AND ADJUDGED:

1) This Court's Judgment granting a writ of conditional habeas corpus dated May 21, 2004 is not declared to be an Absolute Writ of Habeas Corpus; and

2) The July 6, 2000 Judgment of Conviction entered in McCracken Circuit Court Action 99-CR-00021 against Petitioner Carrie Gentry is declared null and void, and without effect.

This is a final and appealable Judgment, and there is no just cause for delay.

July 21, 2005

s/ Edward H. Johnstone, Senior Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTER DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:03CV 15-J

CARRIE GENTRY PETITIONER

v.

DORIS DEUTH, Warden
Kentucky Correctional Institute for Women RESPONDENT

MEMORANDUM OPINION

This matter is before the Court upon Petitioner Carrie Gentry's Motion to Enforce May 21, 20004 Judgment. Petitioner seeks enforcement of the Judgment of this Court which awarded her a Conditional Writ of Habeas Corpus so as to relieve her of the collateral consequences of her conviction. The Court has reviewed the record and briefs of the parties and, for the reasons that follow, will make the Writ of Habeas Corpus Absolute for failure of the

Respondent to abide by the conditions imposed, and will grant Petitioner the relief requested.

Gentry was convicted of Manslaughter 2nd Degree and Driving Under the Influence in McCracken Circuit Court, and the Judgment of Conviction was entered on July 6, 2000. Gentry was found guilty of driving under the influence, and of causing the motor vehicle accident in which her passenger was killed. Petitioner assigned numerous trial errors on appeal in the state courts, including a claim that she was denied her constitutional right to confront five state prosecution witnesses in violation of the 6th Amendment. After exhausting her state court appeals, Gentry filed in this Court a Petition for Writ of Habeas Corpus. This Court determined that the trial testimony of five prosecution expert witnesses via two-way, closed circuit television (despite their having been subpoenaed for live testimony by the

prosecution) lacked compelling state justification, and violated her right to confrontaion, contray to Maryland v. Craig, 497 U.S. 836, 848-50 (1990). Accordingly, this Court entered Judgment granting Petitioner a Conditional Writ of Habeas Corpus, which reads in pertinent part as follows:

> 2) The motion of the petitioner for a writ of habeas corpus be, and it is, hereby CONDITIONALLY GRANTED if the Commonwealth does not retry Gentry within ninety (90) days of the entry of this judgment should not [sic] appeal be taken, or within ninety (90) days should an appeal be taken by the respondent.

At the time of this Court's decision granting the Conditional Writ of Habeas Corpus, Petitioner had already served her term of incarceration. She was released from prison on July 2, 2003. The Commonwealth elected not to re-try the Petitioner within the ninety (90) day window as permitted by the

Conditional Writ of Habeas Corpus[1]. The Attorney General filed a timely appeal on behalf of the Respondent to the United States Court of Appeals for the Sixth Circuit, by voluntarily dismissed the appeal as of July 14, 2004.

1

A chronology of pertinent events in this case is as follows:

July 6, 2000	McCracken Circuit Court Judgment of Conviction entered
June 5, 2002	Petitioner exhausts state court remedies challenging her conviction
Jan. 23, 2003	Petitioner files habeas corpus petition in U.S. District Court
July 2, 2003	Petitioner completes sentence and is released from prison
May 21, 2004	Federal court grants Conditional Writ of Habeas Corpus
June 23, 2004	Respondent appeals Conditional Writ to Sixth Circuit
July 14, 2004	Respondent voluntarily dismisses appeal challenging Writ
Jan. 27, 2005	petitioner moves to enforce Judgment granting Conditional Writ

The very nature of the Conditional Writ entered in this case contemplated that this Court could re-visit the issue to determine whether the condition precedent was met. For that reason, this Court has jurisdiction to determine whether a party has compiled with the terms of the Conditional Writ, and to otherwise "dispose of the matter a law and justice require." 28 U.S.C. § 2243.

This Court must now decide whether Petitioner is entitled to the relief she has requested for the Respondent's failure to fulfill the terms of the Conditional Writ. At the time Petitioner made the present Motion to Enforce, she was still without an operators license from the Kentucky Department of Transportation, and still a convicted felon according to the penal records of the Commonwealth of Kentucky. Petitioner seeks to enforce the Writ, asking this Court to vacate the

judgment of conviction so as to restore her civil rights and drivers license.

The United States Supreme Court has recognized that habeas corpus relief from such collateral consequences attending criminal convictions should be available, Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968). In Carafas, the Court made it clear the Habeas court s have the poer to relieve successful petitioners of the collateral consequences which burden then even after a criminal sentence has been served. Similarly, the Sixth Circuit Court of Appeals recognized a federal court's authority to fashion relief as justice requires in the case of Glenn v. Dallman, 686 F.2d 418, 423 (6th Cir. 1982), citing Peyton v. Rowe, [companion case decided simultaneously with Carafas] 391 U.S. 54, 88 S.Ct. 1549, 1555, 20 L Ed.2d (1968); and Byrd v. Smith, 407 F.2d 363, 366 n. 8 (5th Cir. 1969). Therein, the

Sixth Circuit noted that a successful petitioner's having obtained final release during the course of his habeas corpus proceedings complicates the process of determining an appropriate remedy; the fact that a petitioner is no longer in custody in any traditional sense does not automatically moot his claim for relief nor defeat federal jurisdiction over the matter, Glenn v. Dallman at 422, citing Carafas.

The Sixth Circuit further elaborated:

> If there is any possibility that "adverse collateral legal consequences" will flow from a prior conviction a defendant has sufficient stake in challenging that conviction to prevent the case becoming moot even though the defendant is no longer in custody or under parole. [Citations omitted.] As the Supreme Court recognized in Carafas, a prior conviction may place numerous legal disabilities and burdens on a habeas corpus petitioner's civil liberties that he would not have if his convictions were expunged. If petitioner in the present case were entitled to

> complete eradication of any felony conviction from his record... then quite clearly petitioner would have substantial stake in challenging his conviction required to save his proceeding from mootness. Glenn v. Dallman at 422-423.

The Court acknowledged that the federal habeas corpus statute permits federal courts to fashion relief as justice requires, and accordingly the Court directed the reclassification of the petitioner's conviction. The Court likened its remedy to one fashioned on other grounds by North Carolina v. Rice,434 F.2d 297, 300 (4th Cir. 1970) [overturned on other grounds by North Carolina v. Rice, 404 U.S. 244, 92 S.Ct. 402, 30 L.Ed 2d 413 (1971)], wherein a successful habeas corpus petitioner who had completed a five-year sentence was entitled to "issuance of the writ with complete cancellation of the record of his (state) convictions."

It is antithetical to the concept of habeas corpus for a court to have the authority to award a conditional writ to a successful petitioner, but to lack the authority to enforce the writ once the conditions contained therein are not fulfilled. A conditional writ by definition assumes that the Court jurisdiction for its enforcement, see for example Phifer, v. Warden, United States Penitentiary, Terry Haute, Indiana, 53 F.3d 859, 865 (7th Cir. 1995). Finally, the habeas corpus statutes themselves would appear to give a habeas court the latitude to use its equitable or injunctive powers to dispose of a habeas corpus matter "as law and justice require." 28 U.S.C. §2243.

Respondent first argues that petitioner was required to file a timely appeal or Rule 59 motion if the terms of the judgment granting the condition writ were not agreeable to her. The Court rejects this motion. First, it was the

Respondent that actually availed itself of an appeal to the Sixth Circuit to challenge the grant of the writ, only to abandon that appeal some several months after its filing. Secondly, even if for the sake of arguments the Petitioner is correct, this Court always retains jurisdiction of matters before it for purposes of making corrections to its judgment on its own motion under Fed.R.Civ.P. Rule 60.

Respondent's second argument is that habeas corpus principles from the overturned United States Supreme Court case of Fay v. Noia, 372 U.S. 391, 430-41, 83 S.Ct. 872, 9 L Ed.2d 837 (1963) which was adopted by the Sixth Circuit in dicta in the unpublished decision of Moore v. Rose, 19 F.3d 1433, 1994 WL 102958 (6th Cir. 1994), should be controlling. Specifically, Respondent relies upon the following language to suggest that a federal district court

lacks any other habeas authority than the power to release a successful petitioner:

> Habeas lies to enforce the right of personal liberty; when that right is denied and a person confirmed, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act only on the body of the petitioner.

This narrow interpretation of a federal court's habeas power has been supplanted by the adoption of the federal habeas corpus statutes contained in 28 U.S.C. §2241 et seq. Such a restrictive approach is contrary to the interpretation of the habeas corpus statutes made by numerous other federal courts throughout the United States.

See for example, Riggs v. Fairman, 399 F.3d 1179 (9th Cir. 2005), a district court has considerable discretion in fashioning a remedy tailored to the injury suffered from the constitutional violation, and a court must consider the

unique facts and circumstances of a particular case; Jeanty v. Bulger, 204 F.Supp.2d 1366 (S.D. Fla. 2002), a court granting a writ of habeas corpus may also issue an injunction in aid of the writ; Gall v. Parker, 231 F.3d 265 (6th Cir. 2000), a habeas court has broad discretion in fashioning habeas relief; Hannon v. Maschner, 981 F.2d 1142 (10th Cir. 1992), a district court may exercise its broad authority in habeas cases to grant any relief it deems necessary, including permanent discharge of a successful habeas petitioner; Hilton v. Braumskill, 107 S.Ct. 2113 (1987), federal courts have largest power to control and direct the form of judgment entered in cases brought up on habeas corpus; Jean v. Meissner, 90 F.R.D. 658 (S.D.Fla. 1981), where appropriate, a habeas court may grant injunctive, declaratory and mandatory relief; Hobson v. Murray, 485 F.Supp. 1340 (E.D. Va. 1980), federal courts

are not narrowly restricted in fashioning an appropriate remedy on granting petition for writ of federal habeas corpus relief but instead, the court is charge to dispose of the matter as law and justice require; U.S. ex. Rel. Marrero v. Warden, Lewisburg Penitentiary, 483 F.2d 656 (3rd Cir. 1973), immediate and unconditional release is not the only remedy available in a habeas corpus proceeding.

The United States Supreme Court has recognized the viability of a petitioner's claim for habeas relief despite the expiration of his sentence and despite the fact that his civil liberties, including suffrage and the right to hold public office, has been restored, Evitts v. Lucey, 469 U.S. 387, 391, 105 S. Ct. 830, 83 L.Ed.2d 821 (1985). The Court has also admonished that conditionals write must be tailored to ensure that all constitutional defect will be cured by the satisfaction of the condition precedent, Hilton v. Braunskill,

481 U.S. 770, 775, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987).

The Conditional Writ of Habeas Corpus entered in this case gave the Commonwealth the opportunity to cure the constitutional defects found by this Court. The Commonwealth elected not to re-try Gentry, nor did it fully prosecute its appeal of the Judgment granting the Writ. Accordingly, this Court finds the condition precedent contained within the Conditional Writ was not met, and an Absolute Writ of Habeas Corpus is granted to Petitioner with instructions for the state court judgment of conviction to be vacated. A Judgment in conformity with this Memorandum Opion has this day been entered.

July 21, 2005

s/ Edward H. Johnstone, Senior Judge
United States District Court